Supreme Court, U.S.
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No. 01-___

IN THE

Supreme Court of the United States

CHURCHILL COUNTY, NEVADA AND
CITY OF FALLON, NEVADA,
Petitioners,

v.

GAIL A. NORTON, IN HER OFFICIAL CAPACITY AS
SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL F. MACKEDON
STEVEN D. KING
City of Fallon
179 S. LaVerne Street
Fallon, NV 89406

RICHARD G. CAMPBELL, JR.
RYAN T. CAMPBELL
CAMPBELL AND CAMPBELL
4745 Caughlin Parkway
Suite 200
Reno, NV 89509

MICHAEL F. MCBRIDE
Counsel of Record
MARTIN G. MALSCH
JOHN W. LAWRENCE
LEBOEUF, LAMB, GREENE
& MACRAE, L.L.P.
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

232455

QUESTIONS PRESENTED

The Truckee-Carson-Pyramid Lake Water Rights Settlement Act ("Act") is a regional plan which empowers the Secretary of the Interior ("Interior") to take various specific actions to address competing needs for the limited amounts of water from the Truckee and Carson Rivers, which originate in the Sierra Nevada mountains in California and Nevada and end in Nevada. Pursuant to one section of the Act, Interior took steps to acquire substantial water rights for the benefit of the Lahontan Valley Wetlands in Nevada. Although Interior had before it other pending proposals for action under the Act which entailed alternative uses of the same limited water resources, and the use of water rights for the Wetlands will preclude other uses and restrict future alternatives under the Act, Interior refused to expand its environmental impact statement ("EIS") under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* ("NEPA") for the Lahontan Valley Wetlands action into a programmatic EIS that would discuss those other actions and their alternatives.

The questions presented are:

1. Is an EIS on a single proposed action sufficient when other proposed federal actions with significant cumulative environmental impacts are pending concerning competing claims on the same limited resource but alternatives to those actions are not discussed, as would be the case if a programmatic EIS were prepared?

2. Is a federal agency excused from complying with NEPA simply because compliance would "challenge" the policy goals of the subsequent statute authorizing the federal actions in question?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner Churchill County is a County within the State of Nevada, and accordingly states that it is not a corporate entity, has no corporate parents or subsidiaries, and has no publicly traded stock.

Petitioner City of Fallon is a City within the State of Nevada, and accordingly states that it is not a corporate entity, has no corporate parents or subsidiaries, and has no publicly traded stock.

In addition to the Honorable Gail A. Norton, Secretary of the Interior, the Respondents in this proceeding included William Bettenberg, in his official capacity as Assistant Director, Office of Policy Analysis, Department of the Interior; Jeffrey Zippin, in his official capacity as Team Leader Truckee-Carson Coordination Office, Department of the Interior; Ronald Anglin, in his official capacity as Refuge Manager, Stillwater National Wildlife Refuge, Department of the Interior; Marvin Plenert, in his official capacity as Regional Director of the U.S. Fish and Wildlife Service; John Doebel, in his official capacity as Assistant Regional Director of the U.S. Fish and Wildlife Service; and Ann Ball, in her official capacity as Project Manager of the Bureau of Reclamation Lahontan Basin Project Office.

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**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court's order (per Reed, J.) granted Respondents' renewed motion and cross-motion for summary judgment and denied Petitioners' cross-motion for summary judgment. (The order is unpublished but appears in the

Petitioners' Appendix ("Pet. App.") at 42a-98a). The Court of Appeals' opinion (per Paez, J.) affirming (Pet. App. 4a-41a) is published at 276 F.3d 1060. The Court of Appeals' order denying rehearing and rehearing en banc and amending its opinion (Pet. App. 1a-3a) is published at 282 F.3d 1055.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion and entered judgment on December 19, 2001. The Court of Appeals denied timely petitions for rehearing and rehearing en banc on March 11, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act ("Act"), Title II of Public Law No. 101-618, 104 Stat. 3294, *not codified*, relevant to this petition are reprinted in the Appendix at Pet. App. 99a-126a. In addition, Section 102 of the National Environmental Policy Act of 1969, *codified at* 42 U.S.C. § 4332, is reprinted in the Appendix at Pet. App. 127a-130a.

STATEMENT OF THE CASE

1. The past is often prologue, and so this Court's seminal decision in *Nevada v. United States*, 463 U.S. 110 (1983), set the stage for the instant litigation. The following description of the Truckee-Carson River-Lake Tahoe watershed and the competing claims for the scarce waters of the Truckee and Carson Rivers borrows liberally from (then)-Justice Rehnquist's opinion in that case, as did the "Relevant Factual Background" portion of the Ninth Circuit's opinion below. Pet. App. at 7a-11a.

Water has always been scarce in Nevada and Nevada has, on average, less precipitation than any other State of the Union. The Carson and Truckee Rivers provide northwestern Nevada with its water supply. The Carson River rises on the eastern slopes of the High Sierra in Alpine County, California, and flows north and northeast over a course of about 170 miles through the Newlands Irrigation Project. Newlands Project irrigation return flows provide the main inflow of water to the Lahontan Valley Wetlands, which includes the Stillwater Wildlife Refuge, the Stillwater Wildlife Management Area, Carson Lake, and the Fallon Paiute-Shoshone Indian Reservation. The Wetlands support a wide variety of wildlife.

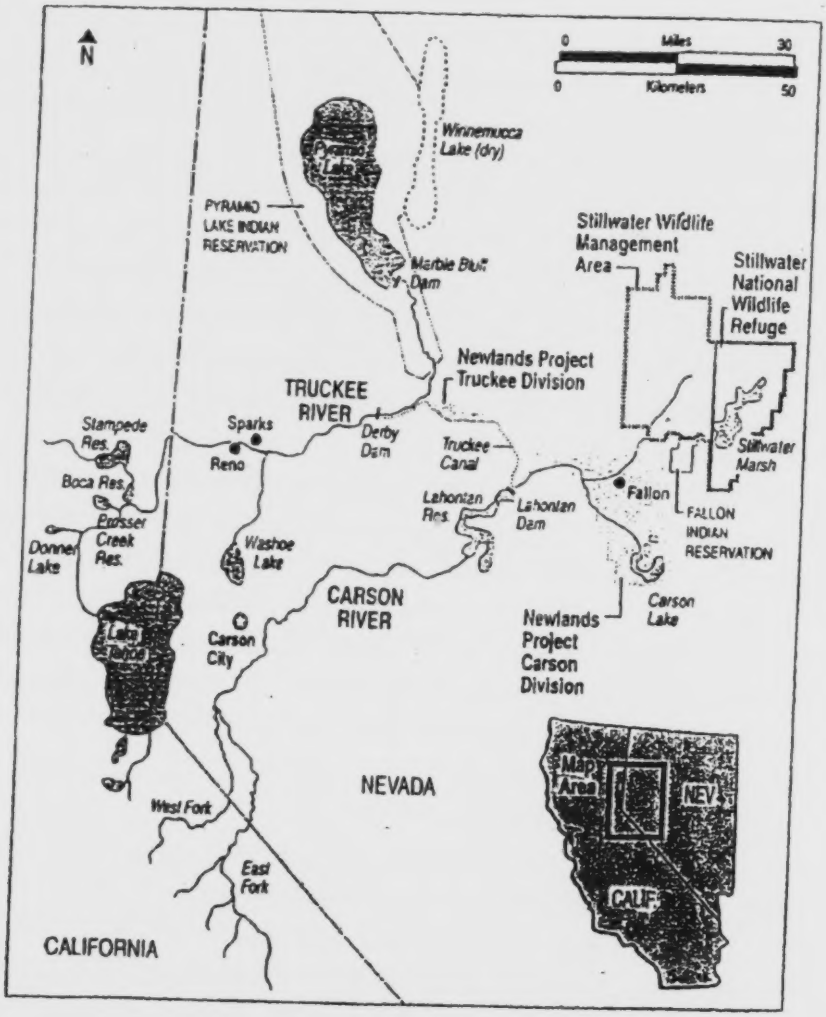
The Truckee River flows out of Lake Tahoe in California, and thence down the eastern slope of the Sierra Nevada mountains. It flows through Reno, Nevada, and after a course of some 120 miles debouches into Pyramid Lake, which has no outlet. The Lake and surrounding areas are part of the ancestral home of the Pyramid Lake Paiute Tribe. The Lake includes threatened (the Lahontan cutthroat trout) and endangered (the cui-ui) fish species.

This area of northwestern Nevada was irrevocably changed early last century when, pursuant to the Reclamation Act, Interior withdrew vast acreage and acquired Truckee and Carson River water rights to construct the Newlands Project for the purpose of irrigating land in the vicinity of the City of Fallon, the seat of Churchill County, Nevada. The Lahontan Dam and Reservoir were constructed on the Carson River to store and release commingled waters from the Carson and Truckee Rivers. A dam and canal were subsequently completed on the lower Truckee River to divert Truckee water to the Lahontan Reservoir. Intense and protracted controversies over water rights for the Newlands Project

spawned extensive litigation which culminated in the so-called "*Orr Ditch*" and "*Alpine*" decrees. *Nevada v. United States*, *supra*, dealt with an ultimately unsuccessful effort by the federal government to re-adjudicate the *Orr Ditch* decree to divert additional water to benefit Pyramid Lake and the Pyramid Lake Paiute Tribe. As will be explained below, the instant litigation arose from renewed efforts by Interior to acquire the very same water rights to benefit a variety of other new uses, including Pyramid Lake and the Tribe.

The Newlands Project created the City of Fallon and Churchill County as they exist today. The area of the County near Fallon is primarily agricultural land, with about 60,000 acres under irrigated agricultural production with water from the Newlands Project. In addition, drinking water for some 25,000 people in the City and County is derived from aquifers which are recharged as a result of the surface irrigation practices of the Newlands Project. However, while the Newlands Project established the vibrant and productive community and economy that exists today in and around Fallon, it also resulted in reduced water levels in Pyramid Lake. This in turn prompted Interior to adopt efficiency measures for the Newlands Project (*i.e.*, the Project's Operating Criteria and Procedures or "OCAP") to increase the Truckee River flow to Pyramid Lake. But the new OCAP in turn reduced return flows from the Newlands Project to the Lahontan Valley Wetlands, thereby drastically reducing their size. A map of the affected area (which was published with

the concurring opinion of Judge Sneed below, 276 F.3d at 1083) is reproduced here for the Court's convenience:



2. Congress passed the Act in 1990 in order to address the competing and emerging demands of certain parties for the limited and previously adjudicated waters of the Tahoe, Truckee, and Carson basins. Among other things, the Act provided for Interior: (1) to negotiate with California and Nevada over a "Truckee River Operating Agreement" (or

"TROA") on operation of federal reservoirs in the Truckee River basin, with a view both to maintaining Lake Tahoe water levels (to increase storage for Reno area growth) and enhancing spawning flows to the Pyramid Lake fishery (section 205); (2) to acquire extensive water and water rights to sustain 25,000 acres of primary wetland habitat within the Lahontan Valley Wetlands (section 206(a)); (3) to prepare a new management plan for the Stillwater Wildlife Refuge (section 206(b)); (4) to acquire water and water rights to benefit the Pyramid Lake fisheries (section 207); (5) to consider revisions to the Newlands Project OCAP in order to reduce water losses in irrigation ditches and canals (section 209); and (6) to recoup water delivered allegedly in excess of authorized amounts (*id*).

Actions under the Act were not to "alter or conflict" with existing vested and perfected water rights, including rights under the *Orr Ditch* decree (section 210(b)(13)), and Interior was required to take measures to address adverse effects on domestic uses of groundwater (section 210(b)(16)). Finally, the Act imposed no fixed deadlines that would constrain Interior's NEPA responsibilities. To the contrary, the Act included a specific provision that it was not to be read as waiving or altering NEPA (section 209).

Congress recognized when it passed the Act that sufficient water resources may not be available to meet all of the Act's varied objectives. The Senate Report concluded that "in retrospect, it is clear that the limited benefits of the Truckee River were promised by the United States to too many interests," S. Rep. No. 101-555, 101st Cong. 2d Sess. (1990), Administrative Record Tab 124, at 3904 (Pet. App. at 135a). The Ninth Circuit acknowledged that an Interior official responsible for implementing the Act admitted that "these issues are complex and interrelated and in some cases the objectives of the law are at cross purposes with one another

and place substantial competing demands on scarce water resources." Pet. App. at 30a (*quoting* an Interior memorandum to the relevant subagencies).

3. The instant case began when Interior began to prepare a single-action EIS for the implementation of the part of the Act (section 206) providing for acquisition of water rights to enhance and restore the Lahontan Valley Wetlands. When Petitioners realized that these acquisitions, when added to other acquisitions under the Act, would seriously damage legally protected underground sources of drinking water, they asked Interior to prepare a programmatic EIS ("PEIS"). Such a PEIS would consider the cumulative impacts of the Lahontan Valley Wetlands acquisitions with other federal acquisitions and actions pending under the Act, and consider the alternatives to the Wetlands acquisitions and to the other acquisitions and actions pending under the Act, with a view to mitigating cumulative impacts. This was especially important to Petitioners because of the Act's express provisions (sections 209, 210(b)(13), and 210(b)(16)), which at a minimum would require mitigation of the cumulative harm to Petitioners.

Although Interior initially agreed to prepare a PEIS, it ultimately decided against one. Interior's final decision rejecting Petitioners' PEIS claim is set forth in the final EIS as a response to Petitioners' comment on the draft EIS that a PEIS should be prepared. Therein Interior justified its decision to publish a single-action EIS as follows: "A programmatic EIS is not required because (a) there is no 'program,' (b) most of the activities authorized or directed by [the Act] do not depend on each other (*i.e.*, they're independent), and therefore (3) [sic: (c)] they could not be adequately analyzed in a single EIS." EIS at pg. 6-3 (Pet. App. at 193a). Interior further explained its decision by quoting from the NEPA Council on Environmental Quality ("CEQ") regulations in 40 C.F.R. § 1508.25 which describe

how "connected actions" and "cumulative actions" require a PEIS, and then concluding that no PEIS was required because its approval of the Wetlands acquisitions "does not automatically trigger . . . any of the other actions authorized or mandated by the [Act]." EIS at pg. 6-21 (Pet. App. at 195a).

Interior's single-action EIS included a discussion of five alternatives (including the baseline or no-action alternative) for acquisition of water for Wetlands restoration, a discussion of possible mitigating measures associated with the five alternatives, and a discussion of cumulative impacts associated with other actions under the Act. *See* EIS Ch. 4.26 (Pet. App. at 144a-186a). The EIS conceded that the combination of federal actions pending under the Act "are expected to have cumulative impacts on environmental resources in the study area," *id.* at pg. 4-135 (Pet. App. at 144a), including an "adverse impact [on] groundwater recharge in the Lahontan Valley," *id.* at pg. 4-159 (Pet. App. at 183a) and "unavoidable adverse effects to the agriculture economy, agriculture-dependent wildlife, and 'farm-preservation values' of community members" *id.* at pg. 4-163 (Pet. App. at 189a). Interior further explained that "[a]gricultural jobs will be lost and the community will experience a shift in its economy as farmlands go out of production. As a result, the character of the community may be substantially altered *by the time the water rights acquisitions program is completed*." *Id.* (emphasis in original).

The EIS also conceded that many other federal actions under the Act will affect how much water must be acquired to achieve all of the Act's objectives. For example, even though the single-action EIS is directed solely at purchase of water rights to enhance the Wetlands, and these Wetlands include the Stillwater National Wildlife Refuge, the new Stillwater National Wildlife Refuge management plan under separate consideration would affect the amount of water needed to

restore and enhance that area. *Id.* at pg. 4-139 (Pet. App. at 151a). The new Truckee River Operating Agreement, also under separate consideration, would change how federal and selected private reservoirs on the Truckee River are operated. Among other things, these changes could allow additional water to be stored in federal reservoirs so that there could be additional flow in the lower Truckee River during the spawning seasons for the cui-ui and Lahontan cutthroat trout. This would diminish the need for other water acquisitions under the Act to enhance Pyramid Lake fisheries. *Id.* at pg. 4-138 (Pet. App. at 149a-150a). Alternatives under consideration in the separate cui-ui recovery project would also have varying needs for new water. *Id.* at pg. 4-142 (Pet. App. at 155a-157a). However, purchase of additional water rights may still be pursued as the most direct approach to enhance the cui-ui. *Id.* at pg. 4-142 (Pet. App. at 155a). The Newlands Project recoupment would result in less water going to the Newlands Project and "adverse impacts to groundwater recharge could be incurred." *Id.* at pgs. 4-144 (Pet. App. at 159a). Finally, adjustments to the Operating Criteria and Procedures ("OCAP") for the Newlands Project could also affect Newlands Project's water uses. *Id.* at pg. 4-146 (Pet. App. at 161a-162a). Yet, according the EIS, each of these actions will be the subject of a separate NEPA review, none of which has been completed. Interior's single-action EIS for the wetlands acquisitions included no discussion of alternatives to these other actions, or mitigating measures associated with them, because they were to be the subject of separate, future NEPA reviews and decisions.

Thus, although the EIS disclosed that adverse effects on groundwater in Churchill County could be mitigated by maintaining Newlands Project irrigation losses (the water seeps into the ground and thereby maintains groundwater levels), this mitigating alternative would require additional water, and so it was rejected summarily because it would

adversely affect Interior's program under another section of the Act to acquire water for restoration of Pyramid Lake and the cui-ui. EIS at pgs. 4-38 through 4-39 (Pet. App. at 142a-143a). But, since Interior's Pyramid Lake cui-ui recovery program was not part of its single-action EIS on Wetlands acquisitions, the Wetlands EIS did not discuss and compare alternatives to the recovery program, or other programs under the Act, that would reduce that program's water needs, even though cui-ui alternatives existed that would make water available that could be used to maintain Newlands irrigation losses. *Id.* at pg. 4-142 (Pet. App. at 155a-156a).

4. Disappointed by Interior's refusal to do a PEIS, Petitioners brought separate (subsequently consolidated) suits against Interior in U.S. District Court for the District of Nevada. The District Court initially granted summary judgment against Petitioners for lack of standing, but that decision was reversed by the Ninth Circuit. *Churchill County v. Babbitt*, 150 F.3d 1072 (9th Cir.), *amended* 158 F.3d 491 (1998). On remand, the District Court granted Interior's motion for summary judgment on the NEPA PEIS claim and denied Petitioners' motion (while granting Interior's cross-motion) for summary judgment on the adequacy of Interior's non-programmatic (or "single-action") EIS for the Lahontan Valley Wetlands water acquisition proposal. The District Court upheld Interior's decision not to prepare a PEIS essentially on two grounds. First, the District Court held that the additional matters under the Act sought to be included had not matured into proposed actions under NEPA, and hence were not required to be included in a PEIS under this Court's teaching in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) ("*Kleppe*"). Pet. App. at 66a-68a. The District Court also held that the various actions under the Act were unconnected because each could proceed without the other and none of them would necessarily trigger another. *Id.* at 65a-66a. The appeal to the Ninth Circuit followed.

5. In the Ninth Circuit, Petitioners pressed their argument that other actions under the Act had ripened into NEPA proposals for action, and that a PEIS was required under *Kleppe* because of the cumulative impacts that would arise from conflicting demands on the same resource. Pet. App. at 23a. As part of this argument Petitioners attacked the sufficiency of Interior's discussion of cumulative impacts and groundwater mitigation alternatives. Pet. App. at 34a.

The Ninth Circuit reversed the District Court's holding that the matters sought to be included in the PEIS had not ripened into federal proposals for action, finding that many of the actions meet the NEPA definition of a proposal, and rejecting Interior's argument that the other projects were not sufficiently definite to permit meaningful review. Pet. App. at 32a.[1] On the PEIS claim, the Ninth Circuit first noted that

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[1] In *Kleppe* this Court stated that "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements" even though "environmental relationships could be shown conclusively." 427 U.S. at 414. Although, as indicated, Interior argued before both the District Court and the Ninth Circuit that other Interior actions under the Act had not ripened into proposals, Interior did not argue that preparation of a PEIS was infeasible or impractical because of undue expense, missing information, unwieldy scope, or other factors, except for a brief mention that a PEIS was not feasible because of the timing of various actions Interior intended. Indeed, (1) given the advanced stages of Interior's other pending proposals for action, as found by Ninth Circuit, (2) Interior's concessions that "enough experience has been gained under the Act to appreciate its many nuances," Pet. App. at 30a, and that a PEIS "would not necessarily require additional studies, information or analysis" and could be based on "existing information," EIS at pg. 6-3 (Pet. App. at 193a), and (3) Interior's successful argument before both the District Court and the Ninth Circuit that its discussion of the cumulative impacts of the other actions was adequate, an argument that a PEIS here would be impractical or infeasible would not have been supportable. Moreover, any argument that a PEIS was infeasible or unnecessary because there were no other pending proposals for action constitutes a *post hoc* rationalization since Interior's final decision in its EIS, rejecting Petitioners' argument, made no mention of this.

"the officials responsible for implementing the Act believed for at least several years that it made good sense to analyze several provisions of the Act as a whole, especially the sections requiring water rights acquisitions and allocations," but that Interior later changed its mind. *Id.* However, while the decision was a "close call," the Court found that Interior's ultimate decision not to prepare a PEIS was not arbitrary. *Id.* at 33a.

The Ninth Circuit noted Interior's conclusion that "the preferred alternative [for Wetlands acquisitions] was expected to cause unavoidable adverse effects . . . ultimately changing the very character of the community," Pet. App. at 37a, and observed not only that "several forthcoming agreements or actions could possibly make it unnecessary to acquire any Truckee River water rights," but also that various other actions under the Act "could well reduce the amount of agricultural losses." Pet. App. at 35a. It found nevertheless that the record would not support the conclusion that the agency's goal in preparing a single-action EIS was to "minimize the possible cumulative impacts by segmenting the wetlands water rights acquisitions program from the analysis of other foreseeable actions." Pet. App. at 33a. It found that the Act "is unwieldy and potentially contradictory in its various requirements," and that "agricultural interests will unavoidably feel much of the impact of the changes that Congress has ordered." *Id.*

Then, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983) ("*Metropolitan Edison*"), the Ninth Circuit stated that "[w]e cannot, as Plaintiffs may wish, sanction the use of NEPA's EIS requirements to challenge the policy goals served by the Settlement Act." Pet. App. at 33a. The Court found without further explanation that Interior had therefore taken the "hard look" required by NEPA. Finally, the Court found that Interior's single-action EIS for the Lahontan Valley Wetlands

restoration proposal contained an adequate discussion of the cumulative impacts of the Lahontan Valley Wetlands proposal together with the other proposals under the Act for use of Truckee and Carson River water. *Id.* at 33a-39a.

Judge Sneed, in a concurring opinion, stated that "[a] comprehensive cumulative impact study, while not legally required in this case, is nonetheless essential given the scarce water supply," and that while in his view the majority opinion was well-reasoned, the controversy over water rights would continue and "[t]his may be a situation in which we simply cannot muster the political will to resolve the various claims." Pet. App at 40a.

6. On March 11, 2002, the Ninth Circuit denied a timely petition for rehearing and rehearing en banc, although it corrected certain parts of its opinion. Pet. App. 1a-3a.

REASONS FOR GRANTING THE WRIT

The petition should be granted for several reasons.

Granting the petition would enable this Court to resolve conflicting trends in NEPA case law and address a gap in the CEQ regulations about when NEPA requires a PEIS, and to do so in a case which presents this issue in its starkest form because it involves segmented agency decisions allocating a uniquely valuable and limited natural resource of concern to all in northwestern Nevada. About twenty years ago in *Nevada v. United States,* 463 U.S. 110, this Court's intervention was needed to assure that the Government's efforts to reallocate Truckee River waters were in accordance with law. The Court reminded the Government that water rights are protected real property, and that water right decrees cannot be reopened unilaterally. Now the Government is again embarking on a series of actions whose effects will be to reallocate this same water for some of the same purposes as before. Sadly, this Court's intervention is again needed to assure that the Government complies with its legal

obligations, in this case under NEPA. The petition should also be granted because the Ninth Circuit's opinion makes an entirely novel use of this Court's opinion in *Metropolitan Edison* to create a NEPA loophole that other federal agencies will be sorely tempted to follow.

I. GRANTING THE PETITION WOULD ENABLE THIS COURT TO RESOLVE CONFLICTING TRENDS IN NEPA CASE LAW AND ADDRESS A GAP IN CEQ REGULATIONS ABOUT WHEN NEPA REQUIRES A PROGRAMMATIC EIS.

1. In the Ninth Circuit, Petitioners argued strongly that a PEIS was required because the various actions under the Act had significant cumulative impacts in that they all involved conflicting demands on a limited resource, the waters of the Truckee and Carson Rivers, and that this factor alone required a PEIS under this Court's teaching in *Kleppe*. Petitioners stressed that the single-action EIS prepared by Interior constituted segmented decision-making which failed to address alternatives for mitigating adverse effects on groundwater.

The court rejected Petitioners' claim on two alternative grounds, each of which is reflected in the questions presented in this petition. First, the Court held that Interior was not arbitrary in preparing a single-action EIS because it was not that agency's goal to "minimize the possible cumulative impacts by segmenting the wetlands water rights acquisitions program from the analysis of other foreseeable action."[2] This portion of the Ninth Circuit's holding gives rise to the first question presented, whether an EIS on a single proposed

[2] The Court also stated that the Act "is unwieldy and potentially contradictory in its various requirements." Pet. App. at 33a.

action is sufficient when other federal actions with significant cumulative environmental impacts are proposed concerning the same claims on a limited resource but alternatives to those actions are not discussed. The Ninth Circuit also rejected Petitioners' PEIS claim because it allegedly "challenged the policy goals" of the Act. This aspect of the Opinion is addressed by the second question presented by this petition, and is discussed later under part II.

2. Under *Kleppe*, a discussion of cumulative impacts can serve three distinctly different functions. First, at a minimum the cumulative effects of past and present actions create the existing environment and one of the purposes of NEPA is to assess the effects of the proposal on this existing environment. *Kleppe*, 427 U.S. at 410. *See also* 40 C.F.R. § 1508.7; *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988). Related to the first, there is a NEPA duty to consider the impacts of the proposal in conjunction with reasonably foreseeable future actions, both federal and non-federal. *Kleppe*, 427 U.S. at 409-10. *See also* 40 C.F.R. § 1508.7; *Grand Canyon Trust v. Federal Aviation* Administration, 2002 WL 1040573 (D.C. Cir., May 24, 2002); *North Carolina v. Federal Aviation Administration*, 957 F.2d 1125 (4th Cir. 1992). These two functions have as their purpose assuring an adequate discussion of environmental impacts. There is no issue here about these two functions, which can be served (albeit with some difficulty) by a single-action EIS of the kind prepared here by Interior.

This case focuses on the third function of a NEPA cumulative impact discussion under *Kleppe*, the consideration of the cumulative impacts of the proposed federal action and other pending proposed federal actions in a PEIS so that a comprehensive discussion of *alternatives* can be prepared when this is required for an informed decision. 427 U.S. at 410 ("Only through comprehensive consideration of pending

proposals can the agency evaluate different courses of action"). This function relates not to the comprehensiveness of the discussion of environmental impacts, but to the *scope* of the EIS in terms of the proposed actions to be covered and their alternatives.

3. When the Ninth Circuit upheld Interior's decision not to prepare a PEIS because Interior could not be accused of segmenting its actions so as to avoid discussing cumulative impacts, it entirely missed the point of a PEIS in a case involving conflicts among alternative uses of a limited resource.[3] In such a case, even the most complete discussion of the cumulative impacts of the proposed action and other federal actions is no substitute for a discussion of alternatives to those various federal actions, something that would only be found in a PEIS.

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[3] Interior's EIS estimated total Truckee and Carson River flows above the Newlands Project at about 833,800 acre-feet per year (546,100 acre-feet per year from the Truckee River and 287,700 acre-feet from the Carson River). EIS at pgs. 3-22 and 3-23 (Pet. App. at 137a and 139a). Possible demands on this resource are more than 935,600 acre-feet per year. This figure is calculated by adding the following: 301,800 acre-feet per year for the Newlands Project, including 51,100 acre-feet per year associated with Lahontan Reservoir evaporation and seepage losses, *id.* at pg. 3-14 (Pet. App. at 136a); 448,800 acre-feet per year of Truckee River flow to maintain Pyramid Lake, before any Pyramid Lake enhancements, *id.* at pg. 3-22 (Pet. App. at 137a); as much as 110,000 acre-feet per year needed for cui-ui recovery; *id.* at pg. 4-142 (Pet. App. at 156a); and 75,000 acre-feet per year of acquisitions to improve the Wetlands, including 20,000 acre-feet per year of acquisitions not included in the EIS but authorized previously by Interior, *id.* at pg. 4-158 (Pet. App. at 181a-182a). This results in an approximate deficit of 101,800 acre-feet per year, and this deficit does not include "drawdowns" and spills, some small irrigation uses, or the expected increased demands for Truckee and Carson River water to serve the increasing populations in the Reno and Sparks, Nevada area and to improve water quality there. *Id.* at pg. 4-147 (Pet. App. at 162a-164a). Thus, the record amply supports the proposition that there were unavoidable conflicts among alternative uses of a limited resource, regardless of the exact amounts.

For example, in the EIS in the instant case Interior discussed various alternative ways to acquire water rights to restore the Lahontan Valley Wetlands, the one program under the Act that was the subject of the EIS, as well as the "no action" alternative of doing nothing further to help the Wetlands. As required by CEQ regulations and case law, Interior also performed a brief analysis of cumulative impacts and dutifully informed Petitioners that they would likely be affected drastically by the acquisitions for the Wetlands combined with the other federal acquisitions and allocations of Truckee and Carson River water rights contemplated by the Act. However, Interior drew no conclusions about the other actions or their alternatives, even though the Wetlands acquisitions committed resources that would be required if some of the other actions or alternatives were to be adopted. As the Ninth Circuit also found, "several forthcoming agreements or actions could possibly make it unnecessary to acquire any Truckee River water rights," and various other federal programs under the Act "individually or in combination, could well reduce the amount of agricultural losses." Pet. App. at 35a.

The importance of this critical missing comprehensive analysis, which can only be provided in a PEIS, is illustrated by the single-action EIS's treatment of adverse effects on Petitioners' groundwater. Alternatives to another program under the Act (for cui-ui recovery) that could mitigate those effects were summarily rejected in important part because they were covered in another section of the Act, and therefore beyond the scope of the EIS. EIS at pg. 4-39 (Pet. App. at 142a-143a). This failure is especially egregious because the Act (section 210(b)(16)) specifically required Interior to "undertake appropriate measures to address significant adverse impacts, identified by studies authorized by this [Act], on domestic uses of groundwater directly resulting from the water purchases authorized by this [Act]." Pet. App.

at 124a. The Ninth Circuit clearly recognized the importance of this section.[4] When Interior separated its program for water rights acquisitions for Lahontan Wetlands recovery from its program for water rights acquisitions for Pyramid Lake cui-ui recovery, and thereby refused to address alternatives to mitigate adverse impacts on groundwater in a comprehensive manner, it also effectively segmented the program under the Act to address adverse impacts on groundwater. As a result the groundwater mitigation program was stranded, as if it was somehow unrelated to the sum of the federal actions under the Act which caused the adverse ground water impacts in the first place.

4. This Court articulated the proper connection between cumulative impacts and alternatives in a PEIS when it stated in *Kleppe* that "[c]umulative environmental impacts are, indeed, what require a comprehensive impact statement" because "[o]nly through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Kleppe*, 427 U.S. at 410 and 413. However, *Kleppe* also included a suggestion that a project could proceed before completion of a PEIS if the project did not commit the agency to other proposals, and the eventual PEIS took account of the cumulative impacts. *Id.* at 414 n.26. This may have led the Ninth Circuit to uphold the single-action EIS in the instant case, because there was a discussion of cumulative impacts and future NEPA reviews were promised for the other actions under the Act.

However, other Courts of Appeals have properly focused on the need for a discussion of the full range of alternatives when presented with an argument that NEPA requires a PEIS

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[4] The Ninth Circuit stated that "[g]roundwater assessment is a key feature of Section 210. The Secretary must, under Section 210(b)(16), assess and remedy significant adverse impacts on domestic groundwater resulting from other provisions of the Settlement Act." Pet. App. at 17a.

prior to irreversible commitments of resources. In *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975), the Second Circuit rejected a Navy EIS on selection of a site in Long Island Sound for dumping of dredged spoil in important part because other federal actions were pending to dispose of spoil in the same area and "if the total amount and type of spoil to be disposed of in this area in the foreseeable future is studied objectively by the Navy and the [U.S. Army] Corps, they may well conclude that some other method of disposal . . . should be urged upon Congress . . . ." "The Navy's piecemeal approach to environmental consideration prevented any such comprehensive planning." *Id.* at 89-90. In *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), the Eighth Circuit was confronted with a Forest Service Plan that addressed ten years' logging in the Boundary Waters Canoe Area in Minnesota, but that was supported by an EIS limited to then-existing timber sales, with no discussion of future sales under the plan. The court held that a comprehensive EIS was required that included future sales because there would be cumulative impacts and "information is needed to determine not only how many areas will be logged, but which areas will be affected so that fragmentation of the remaining large blocks of virgin forest can be avoided." *Id.* at 1306-07. And in *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), the District of Columbia Circuit rejected an Interior Department conclusion that no EIS was required for the issuance of oil and gas leases in the Targhee and Bridger-Teton National Forests of Idaho and Wyoming on the ground that the issuance of the leases, which included stipulations allowing Interior to mitigate impacts, could not be segmented from the later NEPA review of individual site-specific plans for exploration and development. The court stated that "in issuing these leases the Department made an irrevocable commitment to allow some surface disturbing activities, including drilling and road-

building." and once the leases were issued, these activities could not be prevented by the stipulations. *Id.* at 1414-15. *See also Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (*per curium*) ("To determine the appropriate scope for an EIS, courts have considered such factors as whether the proposed segment . . . does not foreclose the opportunity to consider alternatives . . . .")

5. Strangely, the Ninth Circuit got it exactly right in its prior decision in *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir.) (*per curium*). Applying this Court's decision in *Kleppe*, the court there rejected Interior's concept of separate EIS on the exercise of individual option contracts to use water from the Yellowtail and Boysen Reservoirs in the Northern Great Plains. A comprehensive EIS was required for the overall Reservoirs water marketing program because the program existed as a federal action and, quoting from its prior decision in *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979), "the [NEPA] assessment should occur at an early stage when alternative courses of action are still possible and environmental damage can be mitigated." *Id.* at 852. The court further held that the EIS's on each option, which Interior had agreed to prepare, could not be delayed until option exercise, but must instead be prepared prior to their execution, because "it is that time at which the government must decide among various potential users, and in doing so, must conjecture as to possible effects of commitment to one user versus another." *Id.* at 853. Petitioners cited *Environmental Defense Fund, Inc. v. Andrus* in their brief before the Ninth Circuit, but the court ignored the case in its decision.

6. A direct analogy can be drawn here to the venerable legal principle announced in *Ashbacker Radio Corp. v. Federal Communications Comm'n*, 326 U.S. 327 (1945) ("*Ashbacker*"), that mutually exclusive applications for radio licenses must be considered together because granting one

has the necessary effect of denying the other. In the instant case, acquiring extensive water rights for restoration of the Lahontan Valley Wetlands will necessarily mean that those rights will be unavailable for Pyramid Lake cui-ui restoration.[5] If and when Interior gets around to doing its NEPA review on all of the other actions under the Act, including cui-ui restoration and upstream storage, the unavailability of at least some of the Lahontan Wetlands water rights would eliminate options for reserving water to maintain irrigation losses that would mitigate adverse impacts on ground water. So, as in *Ashbacker*, one decision (to acquire water for Wetlands restoration) has the necessary effect of making another (no water for ground water mitigation). In *Ashbacker*, the result was that the two competing applications had to be considered together in a comparative hearing. Petitioners here ask similarly that the competing uses of Truckee and Carson River water be considered in a comparative PEIS.

Considered from a slightly different perspective, in *Ashbacker* a hearing on the first application without considering the second denied the second applicant its right to a hearing because after the first hearing the decision on the second application would already have been made *de facto*. In the instant case, a decision on acquisitions of water rights for Wetlands restoration results in decisions on other actions under the Act, including cui-ui recovery and ground water mitigation, without any prior EIS on those actions. This cannot be reconciled with the NEPA requirement to do an EIS *before* the federal action is taken, or with the separate NEPA requirement that federal agencies shall, "to the fullest extent possible," "study, develop and describe appropriate

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[5] The Act is clear that water rights acquired for one purpose (*e.g.*, Wetlands enhancement) cannot be used for another purpose (*e.g.*, cui-ui recovery). *See* Act, Sections 206(a)(1)(A) and 207(c)(1). Pet. App. 106a, 112a.

alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. 4332(2)(E).

7. On initial reading the CEQ regulations would seem to be consistent with *Kleppe* and the other decisions cited above in requiring a PEIS when there is a need for an informed decision about federal actions with cumulative impacts and their alternatives. However, a careful reading reveals a gap in CEQ's regulations on this precise point.

CEQ's regulations on "Scope" in 40 C.F.R. § 1508.25 indicate when a PEIS is required. CEQ provides here that "cumulative actions," defined as actions which have "cumulatively significant impacts," "should therefore be discussed in the same impact statement," that is in a PEIS. 40 C.F.R. § 1508.25(a)(2).[6] However, this requirement for a PEIS is qualified by the introductory language of subsection (a), which states that the regulations in that subsection apply only to "[a]ctions (other than unconnected single actions)." The result is that a PEIS is required only when there are both cumulative impacts and the actions are "not unconnected." This reading of the CEQ regulations is confirmed in several decisions in the courts of appeals. *E.g., Allison v. Department of Transportation*, 908 F. 2d 1024, 1031 (D.C. Cir. 1990)(reading 40 C.F.R. § 1508.25(a) and *Kleppe* to say that "'unconnected single actions' need not be considered" in an PEIS.)

The CEQ regulations then provide that actions are "connected" if "they are closely related and therefore should be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(1). This is obviously circular. The CEQ regu-

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[6] The CEQ regulations also encourage (but do not require) preparation of a PEIS when the proposed federal actions are "similar." 40 C.F.R. § 1508.25(a)(3). This portion of CEQ's regulations on "Scope" is not in issue here.

lations then provide that "[a]ctions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or contemporaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 10 C.F.R. § 1508.25(a)(1)(i)-(iii).

NEPA case law is clear and consistent in requiring a PEIS when there are cumulative impacts from "connected" proposed federal actions in the narrow sense of "connected" in subparagraphs (i) through (iii) of paragraph 1508.25(a)(1). *E.g., Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974); *Friends of the Earth v. Coleman*, 513 F.2d 295, 299 (9th Cir. 1975). But can federal actions also be "connected" if, as Interior explained in the instant case, they do not trigger the other actions, may proceed even if the other actions are not taken, and do not depend on the other actions for their justification, but instead preclude the other actions or limit their alternatives? The CEQ regulations on "Scope" do not address this precise question because it is unclear whether the types of actions listed in subparagraphs (i) through (iii) of paragraph (a)(1) of section 1508.25 define "connected" or are merely examples of actions that are "connected."

In the instant case, the Ninth Circuit found that the Interior actions are not "connected" within the meaning of the CEQ regulations, but it had in mind here the limited sense of "connected" in 40 C.F.R. § 1508.25(a)(1)(i)-(iii).[7] As

[7] The Ninth Circuit stated that "Plaintiffs [Petitioners] here do not argue that the sections of the Settlement Act . . . are 'connected actions' within the meaning of the [CEQ] regulations . . . ." Pet. App. at 28a. However, Petitioners did argue that the Act included a common core of water supply concerns, including Fallon's and Churchill County's domestic drinking water, arising from the fact that water rights are subject to reallocation and Interior could not engage in irreversible water-rights acquisitions without a PEIS. Petitioners' (Appellants') Ninth Circuit Brief at 29-36.

explained above, this narrow reading is not compelled by the text. Moreover, it defies the logic of NEPA to require a PEIS when one federal action necessarily leads to another, but not to require one when one federal action precludes or limits another because conflicting demands are being made on a limited resource. In both cases the actions are connected within the meaning of "connected" in the introductory language of 40 C.F.R. § 1508.25(a)(1), and in both cases failure to do a PEIS results in a situation where *de facto* decisions are made about other federal actions and their alternatives without preparation of an EIS, notwithstanding the existence of significant cumulative environmental impacts.

8. This case is vitally important to an informed decision on the use of the Truckee and Carson Rivers and the future of northwestern Nevada. This Court has observed previously that "the Government is completely mistaken if it believes that the [Truckee River] water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Nevada v. United States*, 463 U.S. at 126. Here the Government is again embarking on a plan to redistribute these same water rights, to achieve some of the same objectives as the ill-conceived proposal in *Nevada v. United States, supra*. Because these rights cannot be treated as a simple fungible commodity like bushels of wheat, Petitioners and others affected in northwestern Nevada have the right to expect informed decision-making based on a PEIS which discusses cumulative impacts, the competing uses of the scarce resource which the Act contemplates, and a full range of reasonable alternatives.

9. The first question presented also transcends the important matter of allocation of Truckee and Carson River water rights. It affects all who use a limited resource and are subject to federal agency decisions on alternative uses of that

resource. While NEPA is a procedural statute, and does not mandate any particular decision, it is intended is to promote informed federal decisions, whatever the outcome. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). The Ninth Circuit's approach to NEPA compliance guts informed decision-making by sanctioning an agency process in which choices are made about allocation of a limited resource as if there were no limits to the resource and other pending claims simply did not exist. In short, the allocation of resources here was a zero-sum game, but Interior refused to play by the rules of such a game, and pretended instead that amounts could be added or subtracted without regard for the total.

II. THE NINTH CIRCUIT'S OPINION MAKES AN ENTIRELY NOVEL AND UNWARRANTED USE OF THIS COURT'S OPINION IN *METROPOLITAN EDISON* TO CREATE A NEPA LOOPHOLE.

1. The Ninth Circuit also rejected Petitioners' PEIS claim because "agricultural interests will unavoidably feel much of the impact of the changes that Congress has ordered," and "[w]e cannot, as Plaintiffs may wish, sanction the use of NEPA's EIS requirements to challenge the policy goals served by the Settlement Act." Pet. App. at 33a. The only support cited for this proposition was this Court's decision in *Metropolitan Edison*, 460 U.S. at 777. *Metropolitan Edison* held that psychological stress arising from fears of a federal action (in that case the re-licensing of the Three Mile Island Unit 1 nuclear power plant) is not an environmental impact required to be discussed in an EIS.

2. The Ninth Circuit held here that a PEIS otherwise required by NEPA need not be prepared if this would "challenge the policy goals" of the later-enacted statute providing authority for the federal proposals in question. The Ninth Circuit apparently had in mind that a PEIS would need to include a comprehensive discussion of alternatives to mitigate effects on agriculture which the Act seemingly accepted as given, or that preparing a PEIS would delay commencement of an action considered environmentally beneficial by the Act, restoration of the Lahontan Valley Wetlands. Or perhaps the court had in mind what Judge Sneed identified in his concurring opinion, "a situation in which we simply cannot muster the political will to resolve the various claims," Pet. App. at 40a, as if to suggest that the Act contained some implicit directive to Interior (and the federal courts) to stay aloof from difficult and politically sensitive controversies over western water rights.

3. There is no possibility of a direct conflict between the requirements of NEPA and the language of the Act. The Act includes no time deadlines for water rights acquisitions and includes a NEPA savings clause (section 210(b)(9)). This clause, not discussed in the Ninth Circuit's opinion, provides that "[n]othing in this title [the Act] shall be construed as waiving or altering the requirements of . . . the National Environmental Policy Act of 1969." Pet. App. at 123a. Petitioners never challenged the Act or its goals. Morever, there is nothing in the Act to suggest that any and all adverse effects on agriculture were deemed acceptable, or to suggest that Interior need not address any controversial and sensitive water rights issues. The Ninth Circuit's rationale here was developed by it *sua sponte*; no party had the temerity to argue that the Act somehow amended NEPA. So we are left with the proposition that NEPA compliance is excused not because of an "irreconcilable and fundamental conflict," as in *Flint Ridge Devl. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426

U.S. 776 (1976) ("*Flint Ridge*"), or even because of some less dramatic conflict with statutory language, but rather because of some amorphous, undefined, alleged conflict with the statute's "goals."

4. The proposition that NEPA allegedly is amended by implication whenever full compliance would conflict with the goals of a subsequent statute is directly contrary to this Court's holding in *Flint Ridge*. In *Flint Ridge* this Court held straightforwardly that NEPA's command that federal agencies comply "to the fullest extent possible" meant that a subsequently enacted statute would not excuse non-compliance with NEPA unless there was an "irreconcilable and fundamental conflict" with the agency's duties under the second statute. *Id.*, 426 U.S. at 787-88. There is no suggestion in *Metropolitan Edison* that *Flint Ridge* was being overruled, and the language from *Metropolitan Edison* quoted by the Ninth Circuit was *dicta* in any event. No other federal court has suggested that *Metropolitan Edison* overruled *Flint Ridge*. It follows that *Flint Ridge* remains good law, especially where (as here) a statute explicitly requires an agency to comply with NEPA. The notion that NEPA compliance is excused is flatly incorrect.[8]

5. The Ninth Circuit's decision creates a loophole in NEPA for other federal agencies to exploit. Unless review is granted and the Ninth Circuit's judgment is overturned, federal agencies will use the amorphous concept of a challenge to the policy goals of a statute as an excuse for all manner of NEPA violations. Creative statutory construction will replace substantive environmental evaluation.

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[8] The failure of the Court of Appeals even to recognize that the Act contained an explicit statement that NEPA applied to Interior's actions under it is clear error, warranting summary remand for further consideration of that statutory language and *Flint Ridge*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. MACKEDON
STEVEN D. KING
City of Fallon
179 S. LaVerne Street
Fallon, NV 89406

RICHARD G. CAMPBELL, JR.
RYAN T. CAMPBELL
CAMPBELL AND CAMPBELL
4745 Caughlin Parkway
Suite 200
Reno, NV 89509

MICHAEL F. MCBRIDE
Counsel of Record
MARTIN G. MALSCH
JOHN W. LAWRENCE
LEBOEUF, LAMB, GREENE
& MACRAE, L.L.P.
1875 Connecticut Avenue N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000

Attorneys for Petitioners

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